85-1236

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANR PIPELINE COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 22, 1986

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QUESTIONS PRESENTED

The Federal Energy Regulatory Commission ("Commission") in Order No. 380, adopted a rule which declares unenforceable all variable cost minimum bill provisions of gas sales contracts of interstate natural gas pipeline companies. This order seriously and adversely effects the billings and operations of most interstate natural gas pipeline companies in the United States and the gas consumers served by those companies. The questions here presented are:

1. Whether the Court of Appeals erred in affirming such Commission order which abrogates, and destroys the mutuality of, gas contracts and results in substantial increases in gas costs to, and threatens the gas supply of, gas consumers, and which was in excess of the Commission's authority, arbitrary and capricious, lacking in substantial evidence, and based upon insufficient analysis and erroneous premises.

2. Whether the Court of Appeals erred by affirming the Commission's decision to apply Order No. 380 to Petitioner ANR Pipeline Company ("ANR"). The Commission asserted that it could override final and binding Commission-approved settlement agreements which specifically control this issue as to ANR.

PARTIES TO THE PROCEEDINGS

In addition to Petitioner, ANR Pipeline Company,[1] the parties below were: the Federal Energy Regulatory Commission, Great Lakes Gas Transmission Company, Transwestern Pipeline Company, Michigan Consolidated Gas Company, Northern Illinois Gas Company, Pan-Alberta Gas Ltd., Foothills Pipe Lines (Yukon) Ltd., The Peoples Gas Light and Coke Company, Tennessee Gas Pipeline Company, Midwestern Gas Transmission Company, Colorado Interstate Gas Company, Columbia Gas Transmission Corporation, Natural Gas Pipeline Company of America, Consumer Power Company, Panhandle Eastern Pipe Line Company, Trunkline Gas Company, Public Utilities Commission of the State of California, InterCity Gas Corporation, Pacific Gas and Electric Company, Pacific Gas Transmission Company, Pacific Interstate Offshore Company, Pacific Offshore Pipeline Company, Southern California Gas Company, Pacific Lighting Gas Supply Company, Michigan Gas Utilities Company, TransCanada Pipelines Limited, The State of Michigan, Michigan Public Service Commission, Public Service Commission of Wisconsin, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, MIGC, Inc., El Paso Natural Gas Company, Brooklyn Union Gas Company, Algonquin Gas Transmission Company, Cascade Natural Gas Corporation, Texas Gas Transmission Corporation, Northwest Energy Company, Consolidated Natural Gas Service Co., Inc., Process Gas Consumers Group and Arkansas Louisiana Gas Co., a Division of Arkla, Inc.

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[1] ANR Pipeline Company ("ANR") is a wholly-owned subsidiary of the American Natural Resources Company. American Natural Resources Company is a wholly-owned subsidiary of Colorado Interstate Corporation which, in turn, is a wholly-owned subsidiary of The Coastal Corporation. Its subsidiaries and affiliates which are not wholly-owned are as follows: Canyon Creek Compression Company; Overthrust Pipeline Company; Geogas Enterprise, S.A.; Jayhawk Pipeline Corporation; Great Lakes Gas Transmission Corporation; Numericom Inc.; and High Island Offshore System.

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* With respect to the Appendix required by Rule 21.1(k), ANR adopts the Appendix filed on January 21, 1986 in *Transwestern Pipeline Company* v. *Federal Energy Regulatory Commission*, Case No. 85-1219, in addition to the attachments included in this Petition for Writ of Certiorari.

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ANR PIPELINE COMPANY,

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v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANR Pipeline Company ("ANR") hereby petitions for a writ of certiorari to review the August 20, 1985 decision of the United States Court of Appeals for the District of Columbia Circuit involving a series of orders issued by the Federal Energy Regulatory Commission ("Commission") in a rulemaking proceeding. These orders declare "inoperative" a long-standing, Commission-approved provision in major natural gas sales contracts of a substantial number of interstate pipeline companies. Accordingly, this proceeding establishes principles of broad importance relative to the entire natural gas industry, and affects most gas consumers in the nation.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit (App. A)[1] is reported at 770 F.2d 1144 (D.C. Cir. 1985). The judgment of the

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[1] Any reference to the Appendix is to the Transwestern Appendix, noted earlier.

Court of Appeals and the orders denying rehearing and rehearing *en banc* (App. B and C at A-57—A-68, A-69 and A-70) are not reported.

The orders of the Federal Energy Regulatory Commission are reported as follows: Order No. 380, 27 F.E.R.C. ¶ 61,318 (1984), 49 Fed. Reg. 22,778 (1984) (App. D at A-71—A-128); Order No. 380-A, 28 F.E.R.C. ¶ 61,175 (1984), 49 Fed. Reg. 31,259 (1984) (App. E at A-129—A-225); Order No. 380-B, 29 F.E.R.C. ¶ 61,076 (1984) (App. F at A-226—A-230); Order No. 380-C, 29 F.E.R.C. ¶ 61,077 (1984), 49 Fed. Reg. 43,625 (1984) (App. G at A-231—A-270); Order No. 380-D, 29 F.E.R.C. ¶ 61,332 (1984) (App. H at A-271—A-279).

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1985 (App. B at A-59—A-68). The orders denying petitions for rehearing and suggestions for rehearing *en banc* were entered on October 25, 1985 (App. C at A-69, A-70).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statute upon which the Court of Appeals' decision is based is the Natural Gas Act, 15 U.S.C. §§ 717-717w (1976 & Supp. V 1981), the relevant portions of which appear at App. I at A-280—A-283 and in Attachment IV to this brief. The Commission's Regulations (18 C.F.R. § 154.111) appear at App. A-123—A-124.

STATEMENT OF THE CASE

The subject Commission orders, pursuant to informal notice and comment procedures, declare "inoperative" a long-standing provision in major interstate natural gas sales contracts which requires the customers of inter-

state natural gas pipelines to pay fully for the minimum volume of natural gas that they have contracted to purchase, if they do not choose to live up to their purchase obligation. This contractual provision is referred to as a "variable cost minimum bill provision", and is normally applicable to only those gas purchasers which have more than one supply source (referred to as "partial requirements customers").

The Commission orders, which will result in lower sales by pipelines whose minimum bill provisions have been abrogated by such orders, were issued despite the fact that such pipelines have based their own gas purchase commitments partially upon the volume of gas which partial requirements customers have contractually obligated themselves to purchase through these minimum bill provisions. Such orders injure the pipelines' full requirements customers (customers which have only one supply source), since they will result not only in substantial cost shifting from partial requirements customers to full requirements customers, but also in increased costs overall, because of decreased sales. The Court of Appeals affirmed these orders, despite their discriminatory effect and the substantial financial impact on the pipelines' full requirements customers and the entire gas industry.

In addition, the Commission applied this new rule to Petitioner ANR even though to do so violated the terms of two Commission-approved settlement agreements.

Gas sales contracts between interstate natural gas pipelines and their customers provide that the pipeline must make available for delivery to the buyer, in each year, whatever amount of gas the buyer requests, up to a specified contractual maximum amount.[2] Many pipelines, including ANR, include in their contracts the reciprocal agreement that the customer must pay for a specified,

[2] With the proviso that no more than a specified maximum amount is required to be delivered on any single day.

lesser, *minimum* volume of gas each year, which is commonly referred to in the gas industry as the "minimum bill" obligation. These reciprocal maximum and minimum volume provisions are more lenient to buyers than are typical contracts in other industries, since the obligations are unequal: the pipeline is required to sell more gas, if the buyer wants it, than the amount the buyer must purchase. Thus, the buyer has built-in flexibility to vary its purchases, between the maximum and minimum, as its needs fluctuate.

The pipeline sales contracts also have another feature of leniency to the buyer in that those customers which do not secure gas from any source in addition to the pipeline (referred to as "Full Requirements" customers) are normally not subject to minimum purchase requirements, but are allowed to purchase all the gas they need from the pipeline. Thus, "minimum bill" provisions typically apply—as they do in ANR's case—only to "Partial Requirements Customers": those which have one or more suppliers of gas in addition to ANR, and thus have the physical ability to "swing" their purchases of gas back and forth among suppliers. Full requirements customers cannot "swing" since they have only one source.

The pipeline's contracts with its customers are replicated, in certain essential respects, in the pipeline's contracts with its gas suppliers. That is to say, the pipeline is able to call upon its suppliers to deliver gas, up to specified daily and annual maximum amounts, *and must pay for specified minimum amounts each year.* (In the jargon of the trade, the pipeline must "take or pay" for the minimum amount.) The pipeline agrees to contract for the purchase of gas—and thus incurs its minimum "take or pay" obligations—based upon its estimate of the amount of gas which its customers will need to buy from it. Pipelines base such estimates upon the predictions by the pipelines and their customers of customer purchases. For customers which purchase all of their gas require-

ments from a single pipeline—the "full requirements customers"—the estimates of purchases equate to estimates of total gas needed by the purchaser. For partial requirements customers, which can "swing" their purchases between sources, the minimum contractual obligations of the customers' minimum bills provide the minimum level for the pipeline's own purchase estimates.

It is obvious from the foregoing that the contracts which pipelines have with their customers and with their gas suppliers are basically reciprocal: the pipeline binds itself to buy a specified minimum volume of gas from its producer suppliers—or at least pay for it—and the pipeline's customers have, in turn, bound themselves to pay for a specified volume of gas from their pipeline suppliers. But, the Commission's orders here under review relieve a pipeline's partial requirements customers from the largest part of their contractual obligations to pay for a minimum volume of gas from their pipeline suppliers. The orders do not, however, relieve the pipeline of any of its obligations to its producer suppliers, or to its customers. Thus, the very foundation of the gas contracting business has been undermined—after the fact and retroactively—by the Commission orders involved here, in an abrupt reversal of decades of practice.

The mechanics of such change start with the fact that the amount which the buyer must pay to a pipeline for each unit of gas which it purchases and receives from the pipeline is the "Commodity Charge". That charge is calculated, under the basic rate schedules, so as to cover the variable costs of the pipeline, plus some portion of its fixed costs. With respect to ANR, the variable costs constitute somewhat over 80% of the Commodity Charge.[3]

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[3] Well over 90% of the variable costs is the cost of the gas which is purchased by ANR for resale to its customers. Major customers also pay a "Demand Charge", which is to cover the remainder of the pipeline fixed costs. The Demand Charge is paid monthly, based upon maximum allowable purchases per day, rather than upon the

The "minimum bill" provision of the long existing, Commission-approved contracts requires each partial requirements customers to pay the *full* Commodity Charge times the minimum annual volume requirement *for which the customer has contracted*, whether or not the customer wishes to receive less gas than that. But the subject orders make that contract provision "inoperative and of no effect at law," and declare that the customer's contractual obligation to pay the variable cost part of the Commodity Charge is cancelled, relative to as much of its purchase obligation as the customer chooses not to honor. (See Section 154.111a(i) of the Regulation propounded by such orders, App. A-123—A-124).

The effect of that Commission regulation here under review is to release each partial requirements customer from about 80% of its payment obligation for gas which it is contractually obligated to purchase, but which it chooses not to receive.[4] The resultant sales losses to pipelines will *create* substantial costs to pipelines, which would not otherwise exist. In addition, they may create even more costs, depending upon the degree of sales loss and other conditions at the time. The result is to greatly increase the overall per unit costs of the pipeline, and that, in turn, means an increase in the cost of gas to at

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level of actual purchases. In addition, smaller customers of ANR pay a "one part rate", rather than a Demand Charge and a Commodity Charge. Such customers, like other "full requirements customers", are not subject to "minimum bills." The rule here under review does not affect Demand Charges or one part rates.

[4] Thus, in this period when "distress gas" is available from producers at discount prices, because of a temporary gas surplus, partial requirements customers are to be freed by the orders under review to ignore their contracts with pipelines—despite the fact that these pipelines are still bound to their resultant contractual obligations to their suppliers—so as to purchase such distress gas instead. But the pipelines are also not released from their contractual obligations to sell *full* contractual volumes to the customers, when the customers demand it.

least those customers of the pipeline which do not reduce their purchases, including those customers which are physically unable to do so.

The additional costs, which are certain to be created by the reduced sales caused by the subject orders, result from the obligations of the pipeline to its producer suppliers of gas, as will be more fully explained below. Pipelines, pursuant to gas purchase contracts, must still "take or pay" for a minimum volume of gas from their gas suppliers. It must be emphasized that the subject orders do nothing to relieve the pipelines from the burden of such prepayments—to the contrary, these orders worsen the problem and increase the cost.[5] Such orders recite the hope that there will be offsetting benefits. As will be discussed, there is no substantial evidence to support that claim, upon which the Commission's position is based.

In addition, the subject regulation was issued and made effective as to ANR, even though it is in violation of the provisions of two settlement agreements in Comission rate cases of ANR, and despite the fact that the Commission approved and reconfirmed those settlements, without making such approvals contingent upon or subject to the *then pending* "minimum bill" rulemaking.

REASONS FOR GRANTING THE PETITION

This case involves orders of the Commission which reverse prior precedent and direct that purchasers of natural gas from interstate pipeline companies are released from their long standing "variable cost minimum bill" contractual obligations to pay the contractual price for minimum contractual volumes they have agreed to purchase. However, the pipelines remain bound to furnish

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[5] For example, pursuant to such "take or pay" provisions, ANR, in the last few years, has paid hundreds of millions of dollars for gas which it has not been able to currently receive, because its gas sales have fallen, as have the sales of most pipelines.

full contractual volumes to the extent the purchasers desire, so that the mutuality of these contracts is destroyed, despite earlier Commission approval and enforcement of such contracts. The pipelines also remain bound to purchase, or pay for, the volumes of gas from *their* suppliers which they earlier contracted for, in reliance upon their expected sales under their customers' now abrogated purchase commitments.

The result is a "squeeze" of the pipeline companies between reduced sales and revenues, as a result of abrogation of their sales rights, and *no* diminution of their obligations. That destruction of the foundation of the contract structure of the industry substantially increases costs to gas consumers overall. It also shifts costs from consumers served by the larger distributors of gas, to those consumers served by the smaller distributors without alternative sources of gas. The adequacy of gas supply for consumers is also threatened by the Commission orders here, which leave pipelines with a drastically reduced ability to predict their gas acquisition needs.

The Commission and Court of Appeals now object to the long existing and approved minimum bill provisions, on the grounds that the pipeline will be enriched if it is ever paid under such provisions for gas which the purchaser chooses not to accept. However, the record shows that such has not happened, because the provisions work, as intended by the parties, to create minimum purchases. Thus, continued opposition to such provisions really means opposition to the concept that a buyer can bind itself contractually to make minimum purchases. That is an incredible, far-reaching attack upon the basic concept of typical contracts and contract mutuality.

The Commission orders here were issued by informal rulemaking, without adequate rational analysis of the enormous economic injury caused by such orders.

The Commission's orders, as to Petitioner ANR, are also invalid because they violate the terms of two settle-

ment agreements in ANR rate cases which the Commission previously approved. The Commission orders assert that the Commission can override such approved agreements, which is contrary to multiple Court of Appeals decisions.[6] That is a vital issue to the administrative law process, and the gas industry in particular, which should be decided here.

I. The Writ Should Be Granted To Avoid The Huge Cost Shifting Among, And Cost Increases To, Consumers Which The Federal Energy Regulatory Commission's Discriminatory Abrogation Of Contract Provisions Has Created

The Commission's orders destroy the mutuality of pipeline gas sales contracts, by declaring unenforceable, all "variable cost minimum bill" provisions. Although pipelines remain obligated to deliver as much gas as customers request, up to contractual maximums, "partial requirements" customers are released from their "variable cost minimum bill" obligation to pay the bulk of the contractual "Commodity Charge" for the volumes of gas that such customers earlier contracted to buy.

In addition, under the pipelines' gas *purchase* contracts, by which they secure from producers the gas which they sell, the pipelines must still "take or pay" for their contractual volumes of gas. Those purchase obligations of the pipelines were premised upon each pipeline's obligations to contract for sufficient supplies to meet the gas requirements of its customers—requirements based partially upon the minimum purchase obligations in the long standing Commission-approved contracts with those customers, which have now been nullified by the Commission's orders.

Such one-sided action of cancelling pipelines' sales rights, while its purchase and sales *obligations* remain

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[6] The Court of Appeals erroneously stated the plain terms of ANR's settlements, and thus avoided dealing with that issue.

intact, is arbitrary, capricious and an abuse of discretion, and thus should be set aside. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414 (1971); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281 (1974). Such action is also unduly discriminatory.

> What is required by the Rule of Law is that agency policies and standards, whether or not modifications of previous policies, be reasonable and non-discriminatory, and flow rationally from findings that are reasonable inferences from substantial evidence. *City of Chicago* v. *FPC*, 385 F.2d 629, 637 (D.C. Cir. 1967), *cert. denied, sub nom. Public Service Comm'n of Wisconsin* v. *FPC*, 390 U.S. 945 (1968).

The above described discriminatorily selective abrogation of contract provisions produces equally discriminatory cost shifting among gas consumers, and also increases the overall cost of gas to consumers served by the pipelines which lose sales as a result of such abrogation. First, total costs of such pipelines, which must be paid by gas consumers, are increased, as the pipeline loses sales because the partial requirements customers have been released from their minimum bill payment obligations. That cost increase results from the cost of financing the "take or pay" payments which the pipeline must pay for the gas they no longer can sell because of the contract abrogation, but must nevertheless pay for to their suppliers. Those financing costs equate to about 20% of the cost of the gas, for *each year* of the five year "makeup period", thus amounting to about 100% of the cost of the "take-or-pay gas".[7]

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[7] The Commission orders speculate that pipeline customers will benefit from lower gas prices on "distress gas" to which the partial requirements customers will "swing", but there is nothing in the record except theory to support such speculation. The Commission and Court of Appeals also ignored the fact that even if such speculative savings occur, they cannot possibly approach the magnitude of the 100% financing costs related to "take-or-pay" payments. In

The pipeline sales losses caused by the subject Commission orders mean that such "take-or-pay costs" are increased, above the level at which they would have been had that pipeline's partial requirements customers purchased their minimum bill contractual obligation amounts. There are two reasons for that result. First, the reduced ability of the pipeline to buy gas from its producer suppliers *will* cause delayed "make-up" of those "take-or-pay" payments *that have already been made*, which causes carrying costs to remain higher. In addition, new "take-or-pay" payments will be caused by the partial requirements customers' failure to purchase their minimum contract volumes.

A second source of increased costs are damages which are likely to be suffered as pipelines fail to meet their purchase commitments, as well as the losses suffered when the reduced ability of the pipelines to make-up gas previously paid for but taken causes pipelines to be unable to make up some of such payments within the contractually allowed time. That causes a forfeiture of all of such payments made, in addition to carrying costs. Again, even if some "swinging" purchasers secured lower gas prices, they cannot offset this kind of cost increase.

In addition to the above described increases of costs, the customers of the pipelines suffering the sales losses, and consumers served by them, will incur increased unit costs of gas from another source. The sales losses mean that the above described increases in cost must be spread over the *reduced* units of sales, thus further increasing the cost of each unit of gas. Consequently, the full requirements customers, which cannot "swing" and reduce purchases, will be paying for increased costs caused by the "swinging" partial requirements customers. They

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addition, as discussed below, the financing costs are borne by all of the pipeline's customers, while such savings, if any, go only to "swinging" customers, thus unfairly shifting costs onto the smaller full requirements customers.

will pay for such costs, including costs relative to gas which the pipeline contracted to purchase to meet the purchase obligations of the partial requirements customers: obligations which the Commission seeks now to abrogate.

The Commission has ignored these facts, so as to now, years later, nullify provisions of Commission-approved contracts,[8] in order to implement a new policy which would deprive the pipeline and its full requirements customers of crucial rights under the Commission-approved contracts. That is contrary to this Court's reasoning in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947). *See also, Civil Aeronautics Board* v. *Delta Airlines, Inc.*, 367 U.S. 316 (1961). The Commission has failed to "supply a reasoned analysis" for its drastic change with respect to the minimum bill provision. *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

The Commission orders involved here, and the Court of Appeals, do not prevent the cost shifting produced by the cost transfer to the consumers served by the small, full requirements customers. Conceding such cost shifting, the Commission engaged in unsubstantiated speculation, upon which it based its theory that eliminating variable cost minimum bills will increase gas sales competition and lower producer gas prices. There is no support for this curious theory that releasing pipeline customers

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[8] A factor which compounds the Commission's error is that the Commission has improperly applied its orders to *existing* gas sales contracts. That discriminatory retroactivity is illustrated by the fact that the Commission's policy statement with regard to "take-or-pay" provisions in gas purchase contracts (F.E.R.C. *Regulations Preambles*, (CCH) Vol. III, ¶ 30,410 (December 16, 1982)) applies only to gas purchase contracts entered into on or *after* the effective date of the policy statement. Rather than using the same applicability (*i.e.* new contracts entered into on or after the date of issuance of the Commission's order), the Commission has, in these proceedings, discriminatorily applied its orders retroactively, by applying them to existing contracts.

to seek gas from other sources, while the pipelines remain bound to the purchase contracts that they entered into to serve such customers—thus *increasing* overall the apparent demand for gas—will *decrease* gas prices. And beyond that, even if savings resulted, they cannot match the increased financial costs, or justify the cost shifting, as noted above. In violation of this Court's holding, the Commission has failed to "examine relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168, 9 L.Ed. 207, 83 S.Ct. 239 (1962)." *Motor Vehicle Manufacturers Assoc.* v. *State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 43 (1983). *See also*, *FPC* v. *United Gas Pipe Line Co.*, 393 U.S. 71 (1968); *American Paper Inst.* v. *American Electric Power Service Corp., et al.*, 461 U.S. 402 (1983).

Thus, the Commission's admission that there are serious consequences of cost shifting to the full requirements customers and the consumers served by them stands, with no valid justification for causing that effect by abrogating long standing contractual provisions which were freely entered into by the parties, with Commission approval. Similarly, the Commission has not denied that the costs of "take-or-pay prepayments" financing will be increased by the orders here under review, but has instead erroneously concluded that "[i]t is simply not essential that the take-or-pay issues be resolved here." App. E at A-153. That misstates the issue. The issue is whether the Commission can take action which so substantially shifts and increases costs, in such a discriminatory and unfair manner. If the Commission—as is the case—cannot or will not eliminate those effects, then its proposed action which creates those effects, by abrogating contract provisions, is unlawful. The Commission's failure to deal with these economic injuries resulting from these orders is arbitrary and capricious. *See Motor Ve-*

hicle Manufacturing Assoc. v. *State Farm Mutual Auto Ins. Co., supra.*

II. The Writ Should Be Granted To Correct The Federal Energy Regulatory Commission's Claim That It Can Violate Settlements Which It Previously Approved

The Commission orders under review here declared the variable cost minimum bill provisions of the contracts of ANR (and other pipelines) to be "inoperative", and did so in a rulmaking proceeding. That action, as to ANR, directly violates the terms of two settlement agreements in ANR rate cases, which settlements were approved by the Commission. The Commission, under established law, is not empowered to violate settlement agreements which it has approved. *See* decisions of multiple courts of appeal in *City of Chicago* v. *FPC*, 385 F.2d 629 (D.C. Cir. 1967), *cert. denied, sub nom. Public Service Comm'n of Wisconsin* v. *FPC*, 390 U.S. 945 (1968); *Continental Oil Co.* v. *FPC*, 373 F.2d 96 (10th Cir. 1967); *Texas Gas Transmission Corp.* v. *FPC*, 441 F.2d 1392, 1394 (6th Cir. 1971); *Amoco Production Co.* v. *FPC*, 465 F.2d 1350, 1355 (10th Cir. 1972); *Mobil Oil Corp.* v. *FPC*, 570 F.2d 1021 (D.C. Cir. 1978).

Before the Court of Appeals, the Commission argued, contrary to the principles established in the above cases, that it can violate settlements which it has approved (and to which its Staff agreed). App. E at A-157. That question is of overriding importance in the natural gas industry, and to the administration of the Natural Gas Act and the Natural Gas Policy Act of 1978. It is also a question of general applicability and importance to each administrative agency which operates by use of settlement agreements. If participants cannot be assured that the bargains which they strike in settlements will be honored, the use of settlements will not be feasible. The entire settlement process will be undermined, contrary to established law.

The Court of Appeals avoided the above question by deciding that the settlement agreements involved here were not violated. But that holding is not the basis of the Commission's decision under review, and is flatly contrary to the clear language of those agreements. Those agreements provide that the question of whether ANR's minimum bill provision was to be eliminated must be decided in a designated ANR rate case before the Commission, after full hearings on the subject devoted to the specific facts of ANR's situation, and that if any change is made, it must be made effective after procedures which will require an effective date of November 1, 1986 or later. The Commission's orders here under review violate those Commission approved settlement agreements by deciding the issue in another proceeding—an informal rulemaking, not devoted to ANR's facts—and by making such decision effective in 1984, well over two years or more earlier than allowed by the settlement agreements.

The Commission did not deny that it has violated the settlements agreements, and the subsequent denial by the Court of Appeals is directly contradicted by those agreements. The agreement in Docket No. RP82-80, *et al.* (Attachment I at p. B-1) states that "all issues relating to the design of Michigan Wisconsin's [9] resale rates *shall be determined* by order after hearing *in Docket No. RP82-80*" (emphasis added). Att. at B-1. Since two sentences later that settlement agreement also says that the "term 'all issues' referred to in the first sentence shall include issues relative to Michigan Wisconsin's minimum bill", the Court of Appeals clearly erred when it stated that "the settlement merely provides that the issue 'be set for hearing in Docket No. RP82-80'; it does not say" that the issue must be decided there. App. A at A-29. In fact, that is just what the above quoted settlement provision says and requires, but the Court of

[9] Michigan Wisconsin Pipe Line Company has become ANR, by name change.

Appeals did not quote from or mention that provision. It ignored it, which is clear error.[10] The Court of Appeals also erred by not even mentioning the other violation of the settlement agreement: the unlawfully early effective date.[11]

The Court of Appeals is clearly in error, and has thus left standing the Commission's assertion that it can override and abrogate settlement agreements which it has approved previously. That destructive, unlawful principle is very important to the administrative law process, and should be reversed by this Court.

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[10] The argument that the settlement agreements did not require decision as to the minimum bill question to be made in ANR's rate case was not made to the Court of Appeals by the Commission, but rather by ANR's customer, Michigan Consolidated Gas Company ("Mich Con"). But that company, in its representations before the Commission in Docket No. RP82-80 made it clear that it understood that the minimum bill issue was to be decided in Docket No. RP82-80. Specifically, Mich Con's attorney stated that "Michigan Consolidated sees the existing minimum bill as the preeminent issue to be litigated *in this proceeding* [Docket No. RP82-80]" and again, in its pretrial brief, Mich Con emphasized that since the minimum bill issue was integrally related to the rate design issues in Docket No. RP82-80, the minimum bill "*must be addressed in this proceeding* in conjunction with [the rate design] elements." (Emphasis added). The issue has been fully litigated in that proceeding, as provided in the Commission order approving the settlement (Attachment II at p. B-3, hereto) and is awaiting Commission decision.

[11] See Attachment III (at p. B-8) to this brief for additional settlement agreement provisions which reinforce the above conclusions. In addition, the Commission did not condition its approval of the above quoted settlement (See Attachment II at p. B-3, hereto) on the results in the then pending rulemaking which is the subject of this appeal, even though it did so in other cases. *See, MIGC, Inc., et al.*, 26 F.E.R.C. ¶ 61,094, 61,223-4 (1984); *Pacific Gas Transmission Co., et al.*, 26 F.E.R.C. ¶ 61,111, 61,270 (1984); *Northwest Central Pipeline Corporation* v. *Arkansas Louisiana Gas Co., a Division of Arkla, Inc.*, 26 F.E.R.C. ¶ 61,070, 61,196 (1984). Thus, there can be no argument that the Commission reserved the right to change the settlement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 22, 1986

ATTACHMENTS

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ATTACHMENT I

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP82-80, RP83-79, CP82-542,
TA81-2-48, TA82-1-48, TA82-2-48, TA83-1-48,
TA83-2-48 and TA84-1-48

MICHIGAN WISCONSIN PIPE LINE COMPANY

STIPULATION AND AGREEMENT

* * * *

ARTICLE VIII

Rate Design

The previously approved Stipulation and Agreement in Docket No. RP81-61 provides that all issues relating to the design of Michigan Wisconsin's resale rates shall be determined by order after hearings in Docket No. RP82-80, and that such order shall be effective prospectively only, as defined in Article III of such setlement. It is agreed that this settlement shall not change such provisions, and evidence and hearings relative to such issues shall be filed and held pursuant to the procedural schedule prescribed in Docket No. RP82-80. The term "all issues" referred to in the first sentence shall include issues relative to Michigan Wisconsin's minimum bill with Michigan Consolidated Gas Company ("Mich Con"), provided, however, that this settlement shall not change the agreement reached in Docket No. RP81-61 relative to Mich Con's minimum bill obligations with Michigan Wisconsin, and provided, further, that no party waives any rights with respect to the substantive standards for decision which

should be applied herein. The term "all issues" shall also include what has been characterized as "incentive rate design" by Commission's "Order in Response to Protests" issued on December 1, 1982, in *Michigan Wisconsin Pipe Line Company*, Docket Nos. TA83-1-48-000 and RP82-80, provided, however, that if any incentive rate design is adopted by the Commission it shall be applied prospectively only and shall adhere to the requirements of the agreement reached in Article XIV, hereof.

* * * *

ATTACHMENT II

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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26 F.E.R.C. (CCH) ¶ 61,090

Docket Nos. RP82-80, RP83-79, CP82-0542,
TA81-2-48, TA82-1-48, TA82-2-48, TA83-1-48,
TA83-2-48 and TA84-1-48

MICHIGAN WISCONSIN PIPE LINE COMPANY

LETTER ORDER

(Issued January 19, 1984)

By Direction of the Commission: Kenneth F. Plumb, Secretary.

On November 23, 1983, Michigan Wisconsin Pipe Line Company (Michigan Wisconsin) filed with the Commission a proposed Stipulation and Agreement in the above captioned dockets. In light of the Commission's order of October 31, 1983 [25 FERC ¶ 61,154], which deferred action on the Stipulation and Agreement certified on August 4, 1983 [24 FERC ¶ 63,051], Michigan Wisconsin stated that it is appropriate to certify the Stipulation and Agreement directly to the Commission for its consideration. The proposed Stipulation and Agreement resolves all issues except for rate design and the special incentive rate schedule, which have been reserved for hearing.

The Commission finds that the proposed Stipulation and Agreement represents a reasonable resolution of the issues and is in the public interest. Accordingly, it is accepted and approved.

The principle provisions of the Stipulation and Agreement are as follows:

(1) As set forth in Article I of the Stipulation and Agreement, the settlement base rates set forth in Appendices B and D are supported by the settlement costs of service in Appendices A and C.

(2) Article II sets forth the manner in which refunds and other rate adjustments are to be made and rates are to be placed into effect.

(3) Article III contains a Commission confirmation relative to the use of liberalized tax depreciation.

(4) Article IV deals with the manner in which the tax adjustment for repricing of line pack, base and current gas is to be resolved.

(5) Pursuant to Article V, the following depreciation rates are to be utilized: transmission facilities—3.25%; storage facilities—4.40%; gathering facilities—8.20%; and negative salvage relative to offshore gathering facilities—.23%.

(6) Article VI provides that the costs of service in Appendices A and C have been computed in accordance with the principles relating to the transportation, separation and handling of liquids and liquefiables in the settlement approved in *Michigan Wisconsin Pipe Line Company*, Docket No. RP80-100-007, *et al.*, and provides for steps if such approval is reversed or amended on appeal.

(7) Pursuant to Article VII, all issues related to the inclusion in Michigan Wisconsin's cost of service of "production related" costs are to be deferred pending the final resolution by the United States Court of Appeals of such matters.

(8) Article VIII provides that the issue of rate design is to be governed by the provisions of the settlement in Docket No. RP81-61 dealing with such issue and further that what has been characterized as "incentive rate design" in the Commission's order of December 1, 1982 in *Michigan Wisconsin Pipe Line Company*, Docket Nos. TA83-1-48 and RP82-80, shall be part of the rate design proceedings in Docket No. RP82-80 [21 FERC ¶ 61,249].

(9) Article IX(A) provides that for the settlement cost of services, Michigan Wisconsin will be allowed to include a take-or-pay payment allowance of $125.5 million, which is the average of the thirteen monthly balances for take-or-pay amounts which were actually incurred and paid by Michigan Wisconsin for the period ended October 31, 1983, Article IX(B) provides for tracking of additional take-or-pay amounts at the interest rate prescribed in the Commission's regulations.

(10) Pursuant to Article X(A), Michigan Wisconsin has agreed to make certain reductions in its rates relative to volumes purchased from its affiliate, ANR Production Company. Pursuant to Article X(B), Michigan Wisconsin has agreed to take all reasonable steps to reduce the gas cost component of its resale rates. Article X(C) sets forth an incentive mechanism for the period November 1, 1983 through October 31, 1984, relative to Michigan Wisconsin's cost of gas purchased from its United States producer suppliers. If Michigan Wisconsin's average cost of gas on a unit of purchase basis from its United States producer suppliers for the period November 1, 1983 through October 31, 1984 exceeds $2.69 per Mcf, Michigan Wisconsin shall refund to its customers $1.7 million for each one (1) cent that such average cost of gas exceeds $2.69 per Mcf, up to a maximum amount of $27.2 million (equivalent to an average cost of gas of $2.85 per Mcf). If, however, such average cost of gas shall be below $2.69 per Mcf for the period November 1, 1983 through October 31, 1984, Michigan Wisconsin shall increase the reve-

nues collected from its customer by $1.7 million for each one (1) cent that such average cost of gas below $2.69 per Mcf up to a maximum amount of $27.2 million (equivalent to an average cost of gas of $2.53 per Mcf). For each three (3) million dekatherms of gas by which Michigan Wisconsin's sales for the period November 1, 1983 through October 31, 1984 are in excess of 585 million dekatherms, Michigan Wisconsin agrees to reduce the amount of increased revenues to which it is otherwise entitled pursuant to the immediately preceding sentence hereof by $1.7 million. Factors to be taken into account in computing the incentive are also set forth in said article.

(11) Article XI provides, *inter alia*, that Michigan Wisconsin shall withdraw its rate increase filing at Docket No. RP83-79 and shall not make effective prior to November 1, 1984 a general rate change pursuant to Section 4 of the Natural Gas Act.

(12) Article XII sets forth guidelines relative to Michigan Wisconsin's future natural gas acquisition practices. This article includes the establishment of a Gas Market and Supply Committee, which will include representatives from Michigan Wisconsin's resale customers, and provides for the furnishing of information to the Commission Staff, state regulatory commissions and consumers.

(13) Article XIII set forth the manner in which the issues in Docket No. CP82-542 are to be resolved.

(14) Article XIV provides for the resolution of claims made by participants in the various dockets covered by the Stipulation.

(15) Article XV contains a confirmation that the cost of service appendices attached to the Stipulation and Agreement reflect representative transportation volumes for purposes of revenue credits under Sections 157.206 (h) and 284.103(d) of the Commission's regulations.

(16) The Stipulation also contains provisions relating to the term of the settlement (Article XVI) and general reservations, including preconditions to this settlement becoming effective (Article XVII).

The Commission's approval of this settlement shall not constitute approval of or precedent regarding any principle or issue in this proceeding. In our October 13, 1983 order, 25 FERC ¶ 61,082, we expressed reservations about approving a settlement which would preclude the Commission from taking enforcement actions regarding violations of the Natural Gas Act, Natural Gas Policy Act or regulations thereunder. We find that this settlement does not raise these objections, as it does not preclude the Commission or its Staff from taking actions regarding any past, present or future violations.

Subject to Article XIV, this letter order is without prejudice to any findings or orders which have been or which may hereafter be made by the Commission, and is without prejudice to any claims or contentions which may be made by the Commission, its Staff, Michigan Wisconsin Pipe Line Company or any person or party affected by this order in any proceedings now pending or hereafter instituted by or against Michigan Wisconsin or any other person or party.

ATTACHMENT III

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP81-61 and RP82-80

MICHIGAN WISCONSIN PIPE LINE COMPANY

STIPULATION AND AGREEMENT IN
SETTLEMENT OF RATE PROCEEDINGS

* * * *

ARTICLE III

Rate Design In Docket No. RP82-80

1. On October 1, 1982, Michigan Wisconsin filed with the Commission, a motion requesting that the Commission accept for filing, and make effective on November 1, 1982, the tariff sheets set forth in Appendix C hereto. Said motion is incorporated herein and made a part hereof by reference. All parties to these proceedings, including the Commission Staff, agree that:

a. The rates set forth on Third Substitute Seventeenth Revised Sheet No. 7 of Volume No. 1 of Michigan Wisconsin's F.E.R.C. Gas Tariff, attached hereto as Appendix C, reflect the use, *inter alia*, of the rate design

principles utilized in the filing in Docket No. RP82-80, and the *Seaboard* method (*Atlantic Seaboard Corporation, et al.*, 11 F.P.C. 43 (1952)) of cost allocation and cost classification. Such cost classification and allocation method shall remain in effect pursuant to this Stipulation and Agreement from November 1, 1982 until the effective date of a Final Commission Order issued pursuant to paragraph 1b, below.

b. All issues relating to cost allocation, classification and rate design will be set for hearing in Docket No. RP82-80. The Commission's decision therein pursuant to such hearings relative to such issues will be effective, prospectively only, on the first November 1 following the date of a Final Commission Order issued in such case; provided, however, that if a Final Commission Order is issued between October 1 and November 1 of the same year, it shall be implemented on November 1 of the next succeeding year.

* * * *

ATTACHMENT IV

Natural Gas Act

15 U.S.C. §§ 717-717w

Section 4, 15 U.S.C. § 717c:

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding

initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.